Foong Chee Chong (suing as sole proprietor of the firm Tien Chan Goldsmiths & Jewellers) v Inspector Mohd Nasir bin Shamsuddin & Anor

HIGH COURT (KUCHING) — CIVIL SUIT NO KG-33 OF 1991
IAN CHIN J
16 JUNE 1998

***Tort** — Conversion — Goods in police possesssion — Whether police department was gratuitous bailee of stolen goods in its custody — Whether police department was liable for conversion when it was unable to return items kept in custody by police officer*

***Tort** — Vicarious liability — Liability of government — Conversion of goods in police custody — Whether conversion by police officer was done in the course of employment — Whether Government of Malaysia vicariously liable for conversion by police officer*

***Tort** — Damages — Exemplary damages — Whether exemplary damages need to the pleaded — Circumstances in which exemplary damages are awarded — Rules of the High Court 1980 O 18 r 7(1)*

The plaintiff was the sole proprietor of the firm, Tien Chan Goldsmiths & Jewellers. On or about August 1985, the plaintiff's firm was burglarized. Gold articles and jewelleries ('the gold') and other gold items ('other items') were recovered and were in police possession kept by the first defendant. On 17 November 1989, the court ordered that the gold and other items be returned to the plaintiff. On 22 December 1989, the plaintiff sought in writing from the police for the return of the gold and other items as the prosecution was no longer proceeding with the case. On 28 March 1990, the police notified the plaintiff that the gold was missing whilst kept by the first defendant though the other items remained.

At all material times, the first defendant was employed by the second defendant, the Government of Malaysia, and paid in respect of his duties as an officer of the second defendant wholly out of revenues of the government.

The plaintiff took out a writ against the first defendant and the second defendant claiming for damages for conversion and breach of duty or negligence. The issues were whether: (i) the first defendant and police department were gratuitous bailees of the gold; (ii) the gold was converted; (iii) the second defendant was vicariously liable for the conversion; (iv) the first defendant and the police department were in breach of duty or negligent; and (v) exemplary damages could and ought to be awarded.

Held, allowing the claim with costs:

(1) The first defendant and the police department were gratuitous bailees of the gold. The fact that the gold was handed to the first

defendant did not prevent the police department from continuing to be a bailee (see pp 426F–I and 427A).

(2) Conversion was established when the police department was unable to return the gold to the plaintiff when the plaintiff demanded for it (see p 427B–C).

(3) It is a necessary implication that the first defendant was authorized on behalf of the second defendant to take into custody the gold to be kept by the police department. Further, the act of taking into custody the gold was a necessary and reasonable act within the sphere of employment and was so connected with his duties. Since the first defendant's conversion was done in the course of his employment, the second defendant was therefore vicariously liable (see pp 428E and 429B).

(4) The disappearance of the gold, in the absence of an explanation, must have been due to the negligence of the first defendant and the police department (see p 429I).

(5) Order 18 r 7(1) of the Rules of the High Court 1980 requires material facts to be pleaded and since a claim for exemplary damages is dependent upon certain facts, they must be pleaded as required by O 18 r 7(1) (see p 430G); *Broome v Cassell & Co Ltd & Anor* [1971] 2 QB 354 not followed; and *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 followed.

Moreover, the award of exemplary damages is limited to cases of arbitrariness or oppressiveness or unconstitutionality. There was no arbitrariness or oppressiveness on the part of the first defendant or the police department. Therefore, the plaintiff had failed to make out a case for exemplary damages (see p 432C–I); *Rookes v Barnard & Ors* [1964] AC 1129 followed.

[Bahasa Malaysia summary

Plaintif adalah tuan punya tunggal firma, Tien Chan Goldsmiths & Jewellers. Pada atau kira-kira Ogos 1985, firma plaintif dipecah masuk. Barang emas and barang intan ('emas itu') dan barang emas yang lain ('barang yang lain') dijumpai dan berada dalam milikan polis dan disimpan oleh defendan pertama. Pada 17 November 1989, mahkamah memerintahkan bahawa emas itu dan barang yang lain dikembalikan kepada plaintif. Pada 22 Disember 1989, plaintif meminta secara bertulis daripada polis untuk mengembalikan emas itu dan barang yang lain kerana pendakwa tidak lagi meneruskan dengan kes itu. Pada 28 Mac 1990, polis memberitahu plaintif bahawa emas itu hilang semasa dalam simpanan defendan pertama walaupun barang yang lain masih ada.

Pada semua masa material, defendan pertama diupah oleh defendan kedua, Kerajaan Malaysia, dan dibayar berhubung dengan tugas-tugasnya sebagai seorang pegawai defendan kedua keseluruhannya daripada hasil kerajaan.

Plaintif mengambil keluar satu writ terhadap defendan pertama dan defendan kedua menuntut ganti rugi untuk konversi dan kemungkiran kewajipan atau kecuaian. Isu-isu adalah sama ada: (i) defendan pertama dan jabatan polis adalah baili tanpa ganjaran untuk emas itu; (ii) emas itu telah dikonvertkan, (iii) defendan kedua adalah bertanggungjawab secara vikarius untuk konversi; (iv) defendan pertama dan jabatan polis kemungkiran kewajipan atau kecuaian; dan (v) ganti rugi teladan boleh dan patut diberikan.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Defendan pertama dan jabatan polis adalah baili tanpa ganjaran untuk emas itu. Hakikat bahawa emas itu telah diberikan kepada defendan pertama tidak mengelakkan jabatan polis daripada berterusan menjadi baili (lihat ms 426F–I dan 427A).

(2) Konversi dibuktikan bila jabatan polis gagal untuk mengembalikan emas itu bila plaintif mendesak untuknya (lihat ms 427B–C).

(3) Adalah satu implikasi yang tidak dapat dielakkan bahawa defendan pertama diberi kuasa bagi pihak defendan kedua untuk mengambil jagaan emas itu untuk disimpan oleh jabatan polis. Selanjutnya, perbuatan mengambil jagaan emas itu adalah satu perbuatan yang tidak dapat dielakkan dan munasabah dalam lingkungan pekerjaan dan berhubung rapat dengan tugas-tugasnya. Oleh kerana konversi defendan pertama dilakukan semasa dalam pekerjaannya, defendan kedua adalah dengan itu bertanggungjawab secara vikarius (lihat ms 428E dan 429B).

(4) Kehilangan emas itu, tanpa sebab, mesti disebabkan oleh kecuaian defendan pertama dan jabatan polis (lihat ms 429I).

(5) Aturan 18 k 7(1) Kaedah-Kaedah Mahkamah Tinggi 1980 menghendaki fakta-fakta material dinyatakan dan oleh kerana tuntutan untuk ganti rugi teladan bergantung kepada fakta-fakta tertentu, mereka mesti diplidkan seperti yang dikehendaki oleh A 18 k 7(1) (lihat ms 430G); *Broome v Cassell & Co Ltd & Anor* [1971] 2 QB 354 tidak diikut; dan *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 diikut.

Tambahan pula, award untuk ganti rugi teladan terhad kepada kes sembarangan atau penindasan atau tidak keperlembagaan. Tidak ada sembarangan atau penindasan oleh pihak defendan pertama atau jabatan polis. Dengan itu, plaintif gagal membuat kes untuk ganti rugi teladan (lihat ms 432C–I); *Rookes v Barnard & Ors* [1964] AC 1129 diikut.]

Notes

For cases on conversion, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 55–86.

For cases on vicarious liability of government, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 992–998.

For a case on exemplary damages, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) para 110.

Cases referred to

Broome v Cassell & Co Ltd & Anor [1971] 2 QB 354 (not follld)
Chua Chye Leong Alan v Grand Palace D-Luxe Nite Club Pte Ltd [1993] 3 SLR 449 (refd)
Goh Choon Seng v Lim Kim Soo [1925] All ER Rep 170 (refd)
Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230 (follld)
Lee Kim Mah & Ors v Abdul Rahman bin Sharif & Anor [1996] 1 CLJ 204 (refd)
Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd [1978] 2 MLJ 137 (refd)
Rookes v Barnard & Ors [1964] AC 1129 (follld)
Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337 (refd)
Taveechai Marine, The [1995] 1 MLJ 413 (refd)
Zakaria bin Che Soh v Chooi Kum Loong & Anor [1986] 1 MLJ 324 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 7(1)

HC Sim (*Reddi & Co*) for the plaintiff.
Ahmad Razif bin Mohd Sidek (Federal Counsel) for the second defendant.

Cur Adv Vult

Ian Chin J:

Introduction

Foong Chee Chong ('the plaintiff') was at all relevant times the sole proprietor of the firm Tien Chan Goldsmiths & Jewellers. He took out the present writ on 1 March 1991 against one Insp Mohd Nasir bin Shamsuddin ('the first defendant') and the Government of Malaysia ('the second defendant') claiming damages for conversion and breach of duty or negligence. However, the present proceedings concerns only the second defendant as judgment for damages to be assessed had already been obtained against the first defendant and the present proceeding is only in respect of the issue of liability. The case was tried on 21 May 1998 with the parties agreeing to the facts which I will set out shortly. The parties have also agreed to be bound by the quantum of damages (if any) which the deputy registrar may award in respect of the case between the plaintiff and the first defendant.

Facts of case

Foong Chee Chong ('the plaintiff') was the sole proprietor of the firm Tien Chan Goldsmiths & Jewellers which was burglarized on or about 18 August 1985 resulting in his losing gold articles and jewelleries ('the gold') and other gold items ('other items') as well. The gold and other items were recovered by the police. Four persons were charged in connection thereto, one was convicted and sentenced to a term of imprisonment while the charge against the rest was not proceeded with. For the purpose of the case resulting in the said conviction of the person, the gold and other items were tendered as evidence and were on 16 November 1985 ordered by the court to be 'retained by the police pending the outcome of the trial of the other three accused' which case was, as mentioned earlier, not proceeded with. The gold and other items were 'released into the possession of the police' and were kept by the first defendant during the period from 2 March 1988 and 19 March 1990. On 17 November 1989, the court ordered that the gold and other items be returned to the complainant. This was followed by the plaintiff writing on 22 December 1989 to the Officer-in-Charge, Major Crime Division, Central Police Station, Kuching, to seek the return of the gold and other items as the prosecution was no longer proceeding with the case against the other three accused. The plaintiff was told around March 1990 that they could be returned to him. However, on 28 March 1990 the plaintiff was notified by Central Police Officers at the Divisional Police Headquarters that the gold was missing whilst kept by the first defendant though the other items remained.

At all material times, the first defendant was employed by the second defendant as a police inspector and paid in respect of his duties as an officer of the second defendant wholly out of revenues of the Government. The first defendant was, as mentioned earlier, the prosecuting officer in the case which resulted in the said conviction of the person. The first defendant and his wife were later charged with having between 2 March 1988 and 19 March 1990 committed criminal breach of trust in connection with the gold that was missing. The charge against the wife was later amended to one of dishonest misappropriation to which the wife pleaded guilty and was convicted and sentenced while the charge against the first defendant was withdrawn. The other items were subsequently returned to the plaintiff.

Issues

From the pleadings and speeches of learned counsel for the parties, it would appear that the issues for determination are: (1) whether the first defendant and police department were gratuitous bailees of the gold; (2) whether the gold was converted; (3) whether the second defendant is vicariously liable for the conversion; and (4) whether the first defendant and the police department were in breach of duty or negligent. There is a further issue of whether exemplary damages could and ought to be awarded.

Were the first defendant and the police department gratuitous bailees? A

The agreed facts relied on by Mr HC Sim, learned counsel for the plaintiff, as establishing a bailment are: (1) the recovery by the police of the gold following the arrest of three suspects; (2) the handing over of the gold to the first defendant pursuant to an order of the court made on 16 November 1985 for the gold to be 'retained by the police pending the outcome of the B trial' of the said criminal case against the said burglars; and (3) the subsequent possession 'by the police' of the gold pursuant to the order. As against that, Mr Ahmad Razif bin Sidek, the learned federal counsel representing the second defendant, submitted that it was not established that the first defendant was authorized by the second defendant to keep C the gold. The arguments call for a consideration of what legally is a 'bailment'. Mr Sim had referred to 2 *Halsbury's Laws of England* (4th Ed) para 1801 where it is stated:

> ... Under modern law, a bailment arises whenever one person (the bailee) is voluntarily in possession of goods belonging to another person (the D bailor). The legal relationship of bailor and bailee can exist independently of any contract, and is created by the voluntary taking into custody of goods which are the property of another, as in cases of sub-bailment or of bailment by finding. The element common to all types of bailment is the imposition of an obligation, because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods. E An action against a bailee can be regarded as an action on its own, sui generis, arising out of the possession had by the bailee of the goods.

The recovery of the gold by the police following the arrest of the four persons, in my view, constituted the police the bailee of the gold which continued when the magistrates' court ordered that the gold be retained by the police. But the gold was handed to the first defendant and this calls for F a consideration of whether the fact that the gold was handed to the first defendant prevents the police department from continuing to be a bailee. Mr Razif appears to me to argue that the plaintiff must establish that the first defendant was authorized by the police department or the second defendant to receive the gold which the magistrates' court ordered to be G retained by the police before the police department can be said to be the bailee. In my view, it is untenable on the part of the second defendant to contend that the first defendant has no authority whatsoever from the second defendant to receive the gold from the magistrates' court. In the first place when the first defendant appeared in the magistrates' court as the prosecution officer, he had been clothed with all the necessary powers H by the police department and by the second defendant in relation to the conduct of the case and the custody of the exhibits, including their production in court and the subsequent resumption of the custody. Having paraded the first defendant as having such authority, there is prima facie evidence that the first defendant had the authority of the police department I and the second defendant to receive the gold on behalf of the police

department. Furthermore, Mr Razif had conceded that the gold was with the police department. Therefore, I am of the view that in so far as the police department is concerned, they had also constituted themselves the bailee of the gold. This takes me to the second issue of whether there was conversion of the gold.

Was there conversion of the gold?

Conversion was established when the police department was unable to return the gold to the plaintiff after the plaintiff demanded for the same (*The Taveechai Marine* [1995] 1 MLJ 413).

Is the second defendant vicariously liable for the conversion?

For the purpose of this issue, it will be recalled that the gold came into the possession of the first defendant. It is also to be borne in mind that the first defendant was constituted bailee of the gold. Therefore, when a demand was made for the return of the gold conversion was committed by the first defendant when he failed to deliver the same to the plaintiff. Mr Razif had contended that the act of conversion by the first defendant was not done 'in the course of employment' and the second defendant is therefore not vicariously liable.

First of the cases relied on by Mr Razif in support of his contention is *Goh Choon Seng v Lim Kim Soo* [1925] All ER Rep 170 (PC). That case concerns the lands of an appellant and that of a respondent which were separated by a wasteland. Part of the duty of the appellant's servants was to collect vegetable rubbish and burn it on the appellant's land but on one occasion the servants without the appellant's authority, burned it on the wasteland with the result that a fire spread and damaged the respondent's property. A passage of that case (at p 172), relied on is in these terms:

> The principle is well laid down in some of the cases cited by the Chief Justice, which decide that:
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> > 'When a servant does an act which he is authorized by his employment to do in certain circumstances or in a manner which are unauthorized and improper, in such cases the employer is liable for the wrongful act.'
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> As the learned Chief Justice says, the manager of the plantation was authorized by his employment to burn the weeds, and that he did it in a manner and at a place which was not authorized by his employer, makes no difference. Time and place are only circumstances or incidents. It is not even suggested that it would have made any difference to the mischief done if the fires had been kindled on the appellant's side of the hedge. As regards all the cases which were brought to their Lordships' notice in the course of the argument, this observation may be made. They fall under one of three heads: (i) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes: then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under

heads (ii) and (iii). Under head (ii) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (iii) some cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorized and would not have authorized, had he known of it. In these cases the master is, nevertheless, responsible.

Mr Razif contended that there is no document to show that the first defendant was authorized to keep the gold though he was authorized to prosecute in a criminal case. Therefore, according to learned counsel, the act of keeping the gold was an unauthorized act and is not a wrongful or unauthorized mode of doing some act which is authorized by the second defendant. The short answer to that contention is how was the first defendant able to produce the gold in court if he was not authorized to have custody of it. Furthermore, as I mentioned earlier, by allowing a police officer, such as the first defendant, to appear in court as a prosecuting officer, the police department and consequently the Government of Malaysia, had implicitly authorized that person to handle the exhibits, which include the taking into custody the exhibits. It must not be forgotten that, in a court case, the only person a subordinate court can liaise with at any time is the prosecuting officer and that officer is the only person whom the court will be able to hand any exhibits to in connection with any case. Therefore, it is a necessary implication that the officer has been authorized on behalf of the Government of Malaysia to take into custody the exhibits when the court makes an order that the same be kept by the police or by the prosecuting officer. If such is not the case, then at every turn in the course of the case, the court will have to require from the prosecuting officer a written authority from the Government of Malaysia to say that he has been authorized to take into custody the exhibits which a court may order the police or prosecution to take into possession. It is not difficult to imagine the havoc and delay it would cause when such written authorization is required as adjournment would be necessary to procure such and in the meantime there is the dilemma of keeping the exhibits, say a tractor or a diamond necklace, safe while waiting for written authorization.

Learned counsel further contended that the act of keeping the gold could not be regarded as a reasonable or necessary thing to do by a prosecuting officer but he did not elaborate any further. For this latter proposition, learned counsel had dutifully referred to *Zakaria bin Che Soh v Chooi Kum Loong & Anor* [1986] 1 MLJ 324. That case concerns a driver in the employ of the government who met with an accident while driving a vehicle with the permission of the head of department. There the court held that even if the driver was on his way home for lunch when he met with the accident, the government was still to be vicariously liable on the ground that though the act was not strictly one required by his employment to perform but it was still to be regarded as within the sphere of his employment as it was a reasonable or necessary thing to do under all the circumstances unless it was expressly or impliedly excluded from his

employment. The court further held that the test to be applied is whether the manner of doing the act was not so far remote from anything contemplated by either party as to take the act out of the employment. This case illustrates how the court would include such acts into the orbit of the sphere of employment where the circumstances of the case would so justify. In the present case, the act of the first defendant in taking the gold into custody is a necessary and reasonable act within the sphere of employment; otherwise, the court would have no one to turn to in order to deliver the gold after it had made the order that the gold be retained by the police. In fact, the act of the first defendant in taking into custody the gold was so connected with his duties as a prosecution officer that it must be regarded as a mode of carrying out his duties (*Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337).

The facts reveal that though the first defendant was initially charged with criminal breach of trust of the gold, the charge was not proceeded with after his wife pleaded guilty to a charge of dishonest misappropriation of the gold. This means that the gold while in the custody of the police was converted by someone other than the first defendant. This fact had not been urged by Mr Razif in relation to the question of liability for conversion. Even if issue was taken based on that fact, I am of the view that it would have been met by the answer of Mr Sim that the liability of the bailee is strict and it does not matter who converted the gold as long as the gold was converted while in the custody of the police, citing *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1978] 2 MLJ 137 and *The Taveechai Marine* [1995] 1 MLJ 413. In any event, even assuming that it can be a defence that the conversion was without the fault of the second defendant or its servants, it was incumbent upon the second defendant since the doctrine of res ipsa loquitur applies (*Chua Chye Leong Alan v Grand Palace D-Luxe Nite Club Pte Ltd* [1993] 3 SLR 449 at p 450) to establish that there was no fault on their part. There was a total lack of evidence on the part of the second defendant. As for the case of *Lee Kim Mah & Ors v Abdul Rahman bin Sharif & Anor* [1996] 1 CLJ 204, I place no reliance on it as the first defendant, unlike in that case, was not convicted of criminal breach of trust. Furthermore, it is not clear what the cause of action in that case was though it appears to be for a certain sum of money but the cause or causes of action had not been stated.

Were the first defendant and the police department in breach of duty or negligent?

Given the fact that the gold was handed to the first defendant to be kept by the police department, the disappearance of the gold must surely attract the doctrine of res ipsa loquitur which I have said earlier. The disappearance of the gold, in the absence of an explanation, must have been due to the negligence of the first defendant and the police department. Since it was not explained how the wife of the first defendant was able to remove the gold, the second defendant had failed to discharge the burden of disproving breach of duty or negligence.

Whether exemplary damages could and ought to be awarded? A

Mr Sim had in his submission urged the court to award exemplary damages even though the same was not pleaded, relying on *Broome v Cassell & Co Ltd & Anor* [1971] 2 QB 354 at pp 378, 399, where it was held that it was permissible to do so. The court there, at p 399, remarked that it was a quite ridiculous suggestion in *The Supreme Court Practice* (1970) Vol 1 at p 263, that a claim for exemplary damages must be pleaded since that may require an amendment to the pleading with each offensive step in the conduct of the defence of a libel case since the defendant's conduct is a factor to be considered. Though the English rules had since been amended, by the provision of O 18 r 8(3): 'A claim for exemplary damages or for provisional damages must be specifically pleaded together with the facts on which the party pleading relies', to provide for the pleading of such a claim, our rules had not been so amended and therefore, according to learned counsel, the court can still award exemplary damages. The amendment did not resolve the reservation expressed in that case about the need for amendment of the pleading. For me, it stands to reason that the facts upon which exemplary damages ought to be awarded should be made known at the early stage to the opposing party so that sufficient time is given to prepare an answer. This can only be achieved by pleading the same. Whether exemplary damages are claimed or not may determine the course of an action, like whether to call evidence and what evidence. In the present case, the facts were agreed to with no oral testimony and with no inkling that exemplary damages would be claimed. To allow a claim for exemplary damages at this late stage is surely a conduct amounting to an ambush which does not serve the cause of justice. For me, I am of the view that it ought to be pleaded and the failure to plead should deprive a party from claiming exemplary damages. The decision of *Broome v Cassell & Co* did not turn on the interpretation of the Rules of the High Court 1980 but rather on the issue of exemplary damages that may be awarded in libel cases which had been awarded in many cases without the need for pleading the same. Since O 18 r 7(1) of the Rules of the High Court 1980 requires material facts to be pleaded and since a claim for exemplary damages is dependent upon certain facts, surely they must, as required by O 18 r 7(1), be pleaded. Apart from that, it appears from the case of *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 (FC) that exemplary damages had to be pleaded though that was not an issue but the court there considered the question of an amendment to include a prayer for exemplary damages in relation to the question of whether an amendment should be allowed when the claim was statute barred. Nevertheless, that case serves to illustrate that exemplary damages were in practice pleaded. In any event, I am humbly of the view that the English court in *Broome v Cassell & Co* took a wrong turn when it decided that exemplary damages need not be pleaded since that decision brought about the said amendment to the English rules which negated the ruling notwithstanding the reservation

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A expressed in *Broome v Cassell & Co* regarding the need for constant amendment in libel cases when the conduct of a defendant became more offensive during the course of the trial.

I will, nevertheless, in case I am wrong in not following *Broome v Cassell & Co*, consider whether this is a fit case for the award of exemplary B damages. In urging exemplary damages, learned counsel contended that the fact that the first defendant was a prosecuting officer and had arbitrarily and oppressively infringed the plaintiff's right, justifies such award, relying no doubt on one of the categories of cases — the arbitrary, oppressive or unconstitutional action of the servant of government — where exemplary damages are awarded, mentioned in a passage of Lord Devlin in *Rookes v* C *Barnard & Ors* [1964] AC 1129 at pp 1226–1227 that was approved in *Cassell & Co Ltd v Broome* [1972] AC 1027. The facts showed that the gold had somehow ended in the hands of the wife of the first defendant with, it can be assumed, the help of the first defendant. Those are the damning acts but Mr Sim had not elaborated how those acts or any other D acts in this case can be said to be 'arbitrary or oppressive' as envisaged by *Rookes v Barnard*, leaving 'unconstitutionality' alone since it is not alleged. In order to determine what those terms connote, it is necessary to look at the origin of exemplary damages. For this purpose, I can do no better than to quote from *McGregor on Damages* (15th Ed) para 407 where it is said:

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> In the 1760s examplary damages first made their appearance on the English legal scene. The earliest cases arose in the cause celebre of John Wilkes and the North Briton. In the government's effort to stop the North Briton from being published, a variety of individuals suffered interference at the hands of public officials, and in two tort actions of 1763 based upon such interference, *Huckle v Money* [1763] 2 Wils KB 205 and *Wilkes v Wood* F [1763] Lofft 1, awards of examplary damages were made. By the end of the decade further awards had appeared in other contexts, and thereafter exemplary damages became a familiar feature of tort — though never contract law, being awarded not only in cases of assault, false imprisonment, defamation, seduction and malicious prosecution but also in cases of trespass to land and, eventually, trespass to goods.

G It would appear to me from the passage that a claim based on conversion would come within those cases called trespass to goods and since exemplary damages were awarded for such cases, there is no reason why a claim for conversion should not be entitled for exemplary damages. That appears to me to be the position until 1960 when the situation changed and this is H how the said author put it, at para 407:

> In the 1960s, the situation totally changed. In *Rookes v Barnard* [1964] AC 1129, the House of Lords took the opportunity to review the whole doctrine and held that, except in a few exceptional cases which are dealt with later, it is no longer permissible to award exemplary damages against a defendant, however outrageous his conduct. That their Lordships recognized the I exemplary principle as out of place in the law of damages is clear from the fact that they stated that their task was to consider, in the absence of any

> decision of the House approving an award of exemplary damages, whether it was open to them 'to remove an anomaly from the law of England'. There was, however, an attempt by the Court of Appeal in *Broome v Cassell & Co* [1971] 2 QB 354 (CA) to question the decision, but on the appeal in that case their lordships put paid to any such questionings. The House was, in the words of the Lord Chancellor, 'not prepared to follow the Court of Appeal in its criticisms of *Rookes v Barnard*, which ... imposed valuable limits on the doctrine of exemplary damages as they had hitherto been understood in English law and clarified important questions which had previously been undiscussed or left confused'. 'We cannot', he added, 'depart from *Rookes v Barnard* here. It was decided neither per incuriam nor *ultra* vires this House'.

From the time of the decision in *Rookes v Barnard*, the award of exemplary damages was limited to certain categories of cases one of which, as mentioned earlier, was the case of arbitrary, oppressive or unconstitutional conduct of the servants of government. This limitation is elaborated in the following passage of the said author, at para 415:

> It may be a matter for speculation how far the House, in selecting this category, was really impressed by the difference in the context of damages between the public and private sectors and how far it was motivated by the need to retain some scope for exemplary damages in order not to appear to be acting too cavalierly with the doctrine of precedent; in such a search, what better authorities to leave standing than those in which exemplary damages had originated? In *Broome* [1972] AC 1027 at pp 1129H–1130A, Lord Diplock doubted whether today it was still necessary to retain this category but in any event it seems unlikely that in practice there will be many cases which will fall within it. The tort books and the court lists are hardly full of cases of actions arising out of oppressive conduct of public servants. It is probably true to say that the first three cases of the opening salvo in the campaign for exemplary damages are the only decisions of the past two centuries which survive, after *Rookes*, by virtue of falling within this category, while *Holden v Chief Constable of Lancashire* [1987] QB 380 (CA) is a so far isolated latterday illustration. In that case, it was accepted that a wrongful arrest by a police officer fell within the category and that, accordingly, whether or not to award exemplary damages should have been left to the jury; the court was not prepared to accept that every act of police officer without authority brought the category into play though it was of the view that, if an act did so because of unconstitutionality, there was no need also to show arbitrary and oppressive behaviour since there were in this first common law category in effect three sub-categories.

I am inclined to adopt the principle, mentioned in the paragraph just quoted, that not every act of a police officer without authority brings that category into play. There must additionally be arbitrariness or oppressiveness or unconstitutionality (like wrongful arrest of *Holden v Chief Constable of Lancashire*). In the present case, the gold was misappropriated by the wife of the first defendant and I do not see how that can be regarded as arbitrariness or oppressiveness on the part of the first defendant or the police department. I am therefore of the view that the plaintiff had failed to make out a case for examplary damages.

A *Conclusion*

In the premises, I order that judgment be entered by the plaintiff against the second defendant for damages that will be assessed by the deputy registrar. Costs to the plaintiff.

B *Plaintiff's claim allowed.*

Reported by Tan Cheng Siong

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